No. 78-1756

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, PETITIONER

v.

HELEN MITCHELL, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY BRIEF FOR THE UNITED STATES

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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1. Without abandoning reliance on the Tucker Act, respondents now primarily assert (Resp. Br. 14-28) that Section 24 of the Indian Claims Commission Act, 28 U.S.C. 1505, establishes a right to recover in money damages against the United States for any "breach of trust" when the claim is brought by a "tribe, band, or other identifiable group of American Indians." We have already dealt with the suggestion that Section 1505 encompasses a wider category of claims than the Tucker Act (Br. 12-15 n.5, 32 n.24).[1] We add here only that, even if respondents were correct in their contention, their reasoning is unavailing for the 1,465 individual litigants in this case who must prevail, if at all, under 28 U.S.C. 1491 rather than 28 U.S.C. 1505.

[1]The Court of Claims has rejected the claim that 28 U.S.C. 1505 does anything more than give "to Indian tribes the same right to sue in this court as is granted to others under the Tucker Act." *Klamath*

Despite respondents' contentions to the contrary (Resp. Br. 26-27 n.49), the claims of the individuals allottees are not within 28 U.S.C. 1505. That provision applies only to claims brought by a "tribe, band, or other identifiable group of American Indians." *Fields* v. *United States*, 423 F. 2d 380, 383 (Ct. Cl. 1970); *Cherokee Freedmen* v. *United States*, 161 Ct. Cl. 787 (1963). The very purpose of the allotment process was to treat Indians as individuals in the settling and use of reservation lands (Br. 22-23), and the claims of individual allottees with respect to their allotments must be brought under 28 U.S.C. 1491.[2]

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and Modoc Tribes v. *United States*, 174 Ct. Cl. 483, 489-490 (1966). See also *Menominee Tribe of Indians* v. *United States*, No. 134-67 (Ct. Cl. Oct. 17, 1979), slip op. 9-10. The statute was designed to lift the previous bar to tribal suits in the Court of Claims so that "Indians shall be treated on the same basis as other citizens of the United States in suits before the Court of Claims." 92 Cong. Rec. 5313 (1946). See also H.R. Rep. No. 1466, 79th Cong., 1st Sess. 3 (1945). The fleeting references in the legislative history of 28 U.S.C. 1505 to claims involving trust assets focus on the "misappropriations of Indian funds or of any other Indian property * * *." 92 Cong. Rec. 5313 (1946). As we noted in our brief (Br. 20-21), acts of misappropriation may constitute takings for which just compensation is required, whether the taking is accomplished by "breach of trust" or otherwise. See, *e.g.*, *Jacobs* v. *United States*, 290 U.S. 13, 16 (1933). Nothing in the legislative history indicates that Congress intended anything other than to give Indians the same right to sue in the Court of Claims that had previously been accorded "his white or black neighbor" under 28 U.S.C. 1491. H.R. Rep. No. 1466, *supra*, at 3.

[2]Respondents acknowledge (Resp. Br. 2-3, 7) that the individual allottees include members of diverse tribal groupings who have simply brought their individual claims in this single suit. The fact that the individual claims have been joined in a single suit does not make the claims those of a tribal entity. Compare *Menominee Tribe of Indians* v. *United States*, 388 F. 2d 1000, 1001 (Ct. Cl. 1967); *Tee-Hit-Ton Indians* v. *United States*, 120 F. Supp. 202 (Ct. Cl. 1954), aff'd, 348 U.S. 272 (1955). The claim of the Quinault Tribe, which concerns separate lands, is a separate claim in this consolidated suit.

The court below did not rest its decision as to individual claimants upon 28 U.S.C. 1505, but on the Tucker Act, 28 U.S.C. 1491 (Pet. App. 4a). Nor did it hold that the Quinault Allottees

2. Respondents contend that the General Allotment Act and other statutes provide the consent to suit necessary for maintenance of claims under 28 U.S.C. 1491 (Resp. Br. 28-46).[3]

a. First, they assert that *any* congressionally established trust duty creates a right to recover money damages for breach of the trust (Resp. Br. 30-32). But this Court has already rejected "as unsound" the claim that a statute establishing substantive rights "of necessity create[s] a waiver of sovereign immunity such that money damages are available to redress their violation." *United States* v. *Testan*, 424 U.S. 392, 400-401 (1976). See also *United States* v. *King*, 395 U.S. 1, 4 (1969). As we explained in our opening brief (Br. 20-21), because of the availability of injunctive and mandamus relief as well as compensation for Fifth Amendment takings, the

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Association qualifies as a plaintiff under Section 1505 (see Pet. Br. 9 n.4). The heterogeneity of its membership, and the recent formation of the Association in 1968 for the purpose of bringing this action (Resp. Br. 2-3, 7) preclude maintenance of claims by the Association under Section 1505. Moreover, neither the Association nor the Quinault Tribe may maintain this suit under Section 1505 to present claims for the individual allottees. *Minnesota Chippewa Tribe* v. *United States*, 315 F. 2d 906, 914 (Ct. Cl. 1963); *Sioux Tribe of Indians*, 89 Ct. Cl. 31, 38 (1939). Accordingly, Section 1505 is relevant to this action at most insofar as the Quinault Tribe may be able to show that it holds land in its own right, in allotment tenure, as successor to individual allottees (see Pet. Br. 9 n.4).

[3]Respondents' reliance on statutes other than the General Allotment Act is discussed at pages 28-29 and nn.18-19 of our opening brief. Consideration of these statutes may properly be left to the Court of Claims on remand. Plainly, they do not support the broad holding below that the United States is liable in money damages for any "breach of trust" in the management of allotted lands.

substantive provisions of the General Allotment Act are not ineffective merely because they do not also provide a damage remedy for "breach of trust." Thus, "[t]he situation * * * is not that Congress has left respondents remediless, * * * but that Congress has not made available * * * the remedy of money damages." *United States* v. *Testan*, *supra*, 424 U.S. at 403.[4]

b. Respondents have divorced their legal contention that *any* express statutory trust creates a right to recover money damages (Resp. Br. 30-32) from discussion of the substance and nature of the "trust" under the General Allotment Act (*id.* at 41-46). As we demonstrated in our opening brief (Br. 21-29), Congress neither intended nor envisioned that the General Allotment Act place the government in the role of an active managing trustee of allotted lands. As respondents acknowledge (Resp. Br. 4, 42), Congress intended that Indians would take up residence on their individual allotments and themselves manage the lands.

Moreover, respondents do not dispute that the limited purposes of the "trust" tenure for allotments established by the General Allotment Act was to preserve the lands from improvident alienation and to keep the land immune from state taxation (Br. 21-29; Resp. Br. 42). Instead, respondents contend that these limited objectives were somehow transferred into a managing trustee relationship when the Department of the Interior began overseeing timber sales on Quinault allotments in 1920.[5]

[4]Like respondents in this case, the respondents in *Testan* claimed that the statute under which they sued "makes available any and all generally accepted and important forms of redress, including money damages." 424 U.S. at 400. The Court rejected that claim because there, as here, the statute establishing substantive rights did not purport to create a right to money damages for its violation. *Id.* at 398-407.

[5]These responsibilities are performed under a power of attorney granted by each individual allottee (Resp. Br. 5).

Of course, the acts of officials of the Department of the Interior cannot by themselves create a waiver of the sovereign immunity of the United States. *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 514 (1940); *United States* v. *Shaw*, 309 U.S. 495, 501 (1940); *Munro* v. *United States*, 303 U.S. 36, 41 (1938); *Finn* v. *United States*, 123 U.S. 227, 232 (1887). And the statutes that guide the Secretary of the Interior in conducting timber sales on allotted and other restricted lands—25 U.S.C. 406 and 25 U.S.C. 446—do not reflect any congressional intent to consent to suit in money damages against the United States for "breach of trust" in performing these management functions. See note 3, *supra*. For the reasons we discussed in our opening brief (Br. 28-29 nn.18-19), the Court of Claims properly eschewed any reliance on these statutes in reaching its conclusion that the General Allotment Act creates a right to money damages against the United States for "breach of trust" in the management of allotted lands.

c. Respondents argue (Resp. Br. 30-31, 38-41) that "trust" responsibilities created either by the General Allotment Act or by the Treaty of Olympia create an implied contract within the scope of the Tucker Act, 28 U.S.C. 1491. These contentions were not raised in the court below or addressed by that court, and are therefore not properly advanced here. See, *e.g.*, *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Neely* v. *Martin K. Eby Construction Co.*, 386 U.S. 317, 330 (1967). In any event, respondents' claims are erroneous.

The relationship established by the General Allotment Act in no respect resembles an ordinary consensual contract. The usual incidents of an express or implied-in-fact contract are wholly lacking.[6] What respondents' assertion amounts to is the contention that a contract is implied in law by the statute. But the Court of Claims plainly lacks jurisdiction over implied-in-law contracts. *United States* v. *Minnesota Mutual Investment Co.*, 271 U.S. 212, 217 (1926).

Similarly, the Court of Claims has no jurisdiction under 28 U.S.C. 1491 over individual claims based on treaties. Compare 28 U.S.C. 1491 with 28 U.S.C. 1505.[7] Respondents cannot circumvent this express limitation on the court's jurisdiction merely by recasting the treaty claim in contract form; if their contention were correct,

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[6]Moreover, with exceptions noted below, unlike true contractual claims, there is here neither a fund paid into the United States Treasury by respondents commensurate with the liabilities alleged, nor a government promise to pay a liquidated or readily determinable sum. As we observed in our brief in *Testan*, these factors distinguish contractual claims and claims for recovery of funds unlawfully exacted or retained from all other claims. Reply Brief for the United States at 7 n.2. Contrary to respondents' suggestion (Resp. Br. 31), the liabilities sought to be fastened upon the United States in this case were neither determinable nor foreseeable to Congress when it adopted the General Allotment Act (see Br. 21-29). Maintenance of such claims depends upon identification of an express congressional authority mandating compensation.

Insofar as respondents' claim for allegedly excessive administration and road fees may prove to constitute claims for money unlawfully exacted or wrongfully withheld, a corresponding fund for their payment has been created on respondents' behalf, and the United States has not urged any sovereign immunity bar (Br. 16 n.6).

[7]The status of any tribal claim based on the Treaty of Olympia under 28 U.S.C. 1505 is not at issue in this case.

the limitation on the court's jurisdiction under 28 U.S.C. 1491 would be meaningless.[8] See *Menominee Tribe of Indians* v. *United States*, *supra*, slip op. 5 n.7.

3. Respondents persist in their contention (Resp. Br. 46-49) that the question presented in this case previously has been decided in their favor in several courts. This contention is in error for the reasons stated on page 3 and and nn.3-4 of the Reply Memorandum for the United States filed in response to respondents' brief in opposition to the petition.

CONCLUSION

For the reasons stated here and in our opening brief, the judgment of the Court of Claims should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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[8]Respondents' argument would also vitiate the doctrine of sovereign immunity as applied to statutory claims. It would be an unimaginative claimant indeed who could not conjure up some action he took in reliance upon a presumed statutory right, which would be sufficient, on respondents' theory, to create an implied contract affording a right to money damages. The respondents in *Testan* could have argued, for instance, that government adherence to the terms of the Classification Act was implicitly incorporated in the terms of their employment, and was therefore guaranteed by contract.

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